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No. 71-291

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

ALEXANDER D. MCNABB, PETITIONER

v.

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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In April 1962, petitioner applied for and was awarded old age insurance benefits effective January 1962. However, on the basis of petitioner's activities in the management of his investment properties, particularly his activities in the purchase of real estate notes at discount, the Secretary determined that petitioner's income therefrom constituted earnings from self-employment and that petitioner was, for the years

in question, continuing to render substantial services to his business. Inasmuch as petitioner received remuneration in excess of $100 per month from his business in 1964 and 1965, the Secretary determined that petitioner's earnings in those years precluded old age insurance benefits for 1964 and required reduction of his benefits for the following year.

After exhausting his administrative remedies, petitioner brought this action in the district court, alleging that his note-discounting activities did not constitute a trade or business from which excess earnings could be applied against old age insurance benefits. The district court granted judgment for the Secretary (Pet. App. 11a), and the court of appeals affirmed (Pet. App. 12a), and denied rehearing (Pet. 2).

This Court has recognized that the determination of "* * * whether the activities of a taxpayer are 'carrying on a business' requires an examination of the facts in each case." *Higgins* v. *Commissioner of Internal Revenue*, 312 U.S. 212, 217. In the instant case, the Secretary's decision that petitioner's old age insurance benefits were subject to offset because of excess earnings was based on a factual determination of the nature of petitioner's note-discounting activities. Both courts below affirmed the Secretary's decision, holding that it was supported by substantial evidence. The factual question of the nature of petitioner's note-discounting activities has thus been fully resolved adversely to petitioner and does not warrant further review.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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